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## What's Wrong with VARA: A Critique of Federal Moral Rights

Peter H. Karlen

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# What's Wrong With VARA: A Critique of Federal Moral Rights

by  
*Peter H. Karlen\**

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## Introduction

The sponsors<sup>1</sup> of the Visual Artists Rights Act of 1990 (VARA)<sup>2</sup> deserve the highest praise. What they achieved represents the culmination of decades of legislative efforts to give American artists rights enjoyed widely throughout the world, especially in Berne Convention countries.<sup>3</sup> These moral rights include the rights to claim and disclaim credit for works of art and to prevent mutilation, modification, distortion, and destruction of the artist's work.<sup>4</sup>

Any practitioner or academic familiar with earlier state legislation quickly sees that VARA is the product of very sophisticated drafting. On the whole it is more detailed than any state law and includes issues barely covered under many state statutes<sup>5</sup> or not covered at all. The protected subject matter, the "work of visual art," is elaborately defined at § 101 of the Copyright Act.<sup>6</sup> The artist's rights, and the waiver of and exceptions to those rights, are also extensively elaborated at § 106A. Similarly, the works-in-buildings provisions at § 113(d) are detailed and thorough.

In first analyzing the legislation, I was impressed by how thorough and clever it was. However, after two years and the opportunity to see how VARA works, it is amazing to see the number of ambiguities and problems the statutory language has spawned. Unlike litigation under state statutes, in which a few serious issues might develop, litigation under VARA often involves shotgun defenses in which numerous issues could arise.

1. Principally sponsored by Senator Edward Kennedy (D. Mass.) in the United States Senate and Representatives Edward Markey (D. Mass.), Robert Kastenmeier (D. Wis.), and Howard Berman (D. Cal.) in the U.S. House of Representatives.

2. Pub. L. No. 101-650, § 601-610, 104 Stat. 5089, 5128-33 (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 506 (Supp. III 1992)).

3. The Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 6bis, reprinted in SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS* 456 (1987).

4. 17 U.S.C. § 106A(a). See the analysis of Berne Convention rights in Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 945 (1990); Leonard D. DuBoff et al., *Artists' Rights: The Kennedy Proposal to Amend the Copyright Law*, 7 CARDOZO ARTS & ENT. L.J. 227, 232 (1989).

5. CAL. CIV. CODE § 987 (West 1990); CONN. GEN. STAT. ANN. §§ 42-116s to -116t (West 1990); LA. REV. STAT. ANN. §§ 51:2151-:2156 (West 1992); ME. REV. STAT. ANN. tit. 27, § 303 (West 1991); MASS. GEN. LAWS ANN. ch. 231, § 85S (West 1992); NEV. REV. STAT. §§ 598.970-.978 (1991); N.J. STAT. ANN. §§ 2A: 24A-1 to -8 (West 1992); N.M. STAT. ANN. §§ 13-4B-2 to -3 (Michie 1992); N.Y. ARTS & CULT. AFF. LAW §§ 11.01, 14.03 (McKinney 1988 & Supp. 1993); PA. STAT. ANN. tit. 73, §§ 2101-2110 (Supp. 1993); R.I. GEN. LAWS § 5-62-2 to -6 (1991); UTAH CODE ANN. § 64-2a-9 (1986).

6. 17 U.S.C. § 101. All references to sections of the Copyright Act refer to title 17, United States Code.

The following is a clause-by-clause critique of VARA which shows some of these hotspots, ambiguities, and problem areas.<sup>7</sup> The analysis is based on the statutory text set forth in capital letters and is followed by commentary.

## I Subject Matter

### § 101 DEFINITIONS

#### A "WORK OF VISUAL ART" IS—

(1) A PAINTING, DRAWING, PRINT, OR SCULPTURE, EXISTING IN A SINGLE COPY, IN A LIMITED EDITION OF 200 COPIES OR FEWER THAT ARE SIGNED AND CONSECUTIVELY NUMBERED BY THE AUTHOR, OR, IN THE CASE OF A SCULPTURE, IN MULTIPLE CAST, CARVED, OR FABRICATED SCULPTURES OF 200 OR FEWER THAT ARE CONSECUTIVELY NUMBERED BY THE AUTHOR AND BEAR THE SIGNATURE OR OTHER IDENTIFYING MARK OF THE AUTHOR.<sup>8</sup>

There are always problems defining "painting,"<sup>9</sup> "drawing,"<sup>10</sup> "print,"<sup>11</sup> and "sculpture."<sup>12</sup> For example, is a mural a painting?<sup>13</sup> What about a mosaic? Or a collage? Where is the borderline between a print and a poster? Also, where is the borderline between a sculpture, on the one hand, and an environmental, landscape, or architectural work, on the other? Because the statute does not provide a broad definition of "fine art" allowing protection for a large variety of works (including multi-media works such as some collages or assemblages), many works

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7. The analysis covers the major substantive aspects of VARA. The procedural and remedial amendments to title 17 and other miscellaneous matters are not covered.

8. 17 U.S.C. § 101.

9. See *Botello v. Shell Oil Co.*, 229 Cal. App. 3d 1130, 1135 (1991) (mural ruled a "painting" under the California Art Preservation Act); *United States v. Perry*, 146 U.S. 71, 75 (1892) (stained glass as a "painting"); *Tiffany v. United States*, 66 F. 736, 737 (C.C.S.D.N.Y. 1895) (painted silk and bone fans); *Brantman v. United States*, 54 C.C.P.A. 444 (1965) (illustrated map declared not to be an original for customs purposes).

10. *In re Vonnegut & Bohn*, 7 Treas. Dec. 414 (1904), *aff'd sub nom. Young v. Bohn*, 141 F. 471 (C.C.D. Ind. 1905) (architect's drawing a work of art for customs purposes); *Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc.*, 159 Cal. App. 3d 637, 644 (1984) (architectural plans not drawings under the California Art Preservation Act).

11. *What is an Original Print?* (*Principles Recommended by the Print Council of America*) in *ART WORKS: LAW, POLICY, PRACTICE* 441, 444 (Franklin Feldman and Stephen E. Weil eds., 1974).

12. See Leonard D. DuBoff, *Bronze Sculptures: Casting Around for Protection*, 3 CARDOZO ARTS & ENT. L.J. 235 (1984) (protection of sculpture in general); *United States v. Olivotti & Co.*, 7 Ct. Cust. App. 46, 48 (1916) (non-representational sculpture); *Stern v. United States*, 3 Ct. Cust. App. 124, 126-27 (1912) (ornamental sculptures); *Brancusi v. United States*, 54 Treas. Dec. 428 (Cust. Ct. 1928) (non-representational sculpture).

13. Yes, according to *Botello*, 229 Cal. App. 3d 1130.

will fall into the cracks, and there will be much litigation about basic definitions.<sup>14</sup>

Another problem arises in counting the "limited edition of 200 copies or fewer." In calculating the number of copies, do we include publishers', printers', and artists' proofs? What about prints or proofs that are *hors de commerce*?<sup>15</sup> When quantifying an edition, numerous states' fine art multiple laws refer to the size of the "regular edition," perhaps excluding proofs, or the size of the "total edition," perhaps including all proofs except trial proofs and copies *hors de commerce*. For the statutes that are silent, there have been few cases, and therefore little explanation, of these terms.<sup>16</sup> No specifics are given in VARA; thus, courts will make the decision rather than Congress.

The requirement that copies be "signed and consecutively numbered by the author" could also create problems. First, what about plate-signed limited editions for prints? Why require the author to individually sign and number? After all, many older artists do not personally sign their editions. In addition, uncertainty will exist with "joint works." Must all the joint authors sign, or will one signature suffice? No answer is given in VARA.<sup>17</sup>

The wording is slightly different for sculptures insofar as the copies in the limited edition must be "consecutively numbered by the author and bear the signature or other *identifying mark* of the author."<sup>18</sup> The question is whether the author must personally apply the signature or identifying mark, which would be a problem for limited edition metal sculptures, for which the signature or identifying mark is frequently pre-cast. In other words, do the sculpture rules not require the author's personal signature, whereas the rules for limited edition prints do?

(2) [A "WORK OF VISUAL ART" IS ALSO] A STILL PHOTOGRAPHIC IMAGE PRODUCED FOR EXHIBITION PURPOSES ONLY, EXISTING IN A SINGLE COPY THAT IS SIGNED BY THE AUTHOR, OR IN A LIMITED

14. See e.g., Leonard D. DuBoff, *What is Art? Toward a Legal Definition*, 12 HASTINGS COMM/ENT L.J. 303 (1990); Peter H. Karlen, *What is Art?: A Sketch for a Legal Definition*, 94 LAW Q. REV. 383 (1978).

15. Literally, "outside of commerce," in other words, "not for sale." These prints or proofs could be given away, but often they are merely kept by the artist or publisher.

16. See, e.g., CAL. CIV. CODE §§ 1740-1745.5 (West 1985); GA. CODE ANN. § 10-1-433 (Harrison 1990); HAW. REV. STAT. § 481F-1 to -5 (1985); ILL. ANN. STAT. ch. 121 1/2, para. 361-369 (Smith-Hurd 1992); MD. CODE ANN., COM. LAW §§ 14-501 to -505 (1990); MICH. COMP. LAWS ANN. §§ 442.351-.367 (West 1989); MINN. STAT. §§ 32.081-.10 (1992); N.Y. ARTS & CULT. AFF. LAW §§ 15.01-.19 (McKinney 1988); N.C. GEN. STAT. §§ 25C-10 to -16 (1989); OR. REV. STAT. §§ 359.300-.315 (1991); S.C. CODE ANN. §§ 39-16-10 to -50 (Law. Co-op. 1992).

17. For problems with joint ownership rules, see generally Peter H. Karlen, *Joint Ownership of Moral Rights*, 38 J. COPYRIGHT SOC'Y U.S.A. 242 (1991).

18. 17 U.S.C. § 101 (emphasis added).

EDITION OF 200 COPIES OR FEWER THAT ARE SIGNED AND CONSECUTIVELY NUMBERED BY THE AUTHOR.<sup>19</sup>

The same problems arise here with regard to calculating the 200 copies and the signing and numbering requirements. The main focus, however, must be on the phrase "for exhibition purposes only." Every photograph is produced for exhibition purposes—it is meant to be shown to someone. Thus, the statute is probably referring to *public* exhibition at a museum, gallery, or other similar exhibition space.<sup>20</sup>

Now that photographic images are digitized, the statute unfairly requires a signature by the author. When a photo exists only on disk, it should still be protected by moral rights laws.<sup>21</sup> But what happens where the photo exists both on disk and on a print signed by the author? In order to get protection, the author would have to destroy the disk, otherwise he would not have a *single* signed copy or a limited edition of 200 or fewer copies that are signed and consecutively numbered by the author. Under the definition of "copy" at § 101 of the Copyright Act, the "first material object in which the work is fixed" is included as a "copy."<sup>22</sup> Therefore, since the word "copy" and not the word "print" is used in this section of VARA, the artist would actually have to *destroy* the negative or the disk to fall under the "single copy" language. The only other alternative (ignoring the "signed by the author" language) would be to have the negative or disk as the "single copy," with no prints! This is indeed an error in VARA, as the drafters could not have meant this result.

A WORK OF VISUAL ART DOES NOT INCLUDE— (A)(i) ANY POSTER, MAP, GLOBE, CHART, TECHNICAL DRAWING, DIAGRAM, MODEL, APPLIED ART, MOTION PICTURE OR OTHER AUDIOVISUAL WORK, BOOK, MAGAZINE, NEWSPAPER, PERIODICAL, DATA BASE, ELECTRONIC INFORMATION SERVICE, ELECTRONIC PUBLICATION, OR SIMILAR PUBLICATION.<sup>23</sup>

Many of these exclusions are overkill. After all, if the "work of visual art" is by definition only a painting, drawing, print, sculpture, or photograph, it could not possibly be a book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication.<sup>24</sup>

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19. *Id.*

20. See the definition of "publication" in relation to "public display" at 17 U.S.C. § 101.

21. The latest cameras, for example, use no film; the work is fixed on disk.

22. 17 U.S.C. § 101.

23. *Id.*

24. The reason for overkill was to calm jittery use groups, particularly in the publishing industry, which was a principal concern of VARA's sponsors. See *Moral Rights in Our Copyright Laws: Hearings on S.1198 and S.1253 Before the Subcomm. on Patents, Copyrights and*

Problems arise from the terms "poster," "map," "globe," "chart," "technical drawing," "diagram," "model," and "applied art." It is often difficult to discern the dividing line between a poster and a print.<sup>25</sup> In addition, a number of works of "fine art" created by well-known artists could be described as "maps." For instance, Joseph Beuys created a work showing a plan of the Paris Metro.<sup>26</sup> Although it is in the form of a map, it is clearly a work of fine art. If a map is created as "art" and not merely designed to convey information, it should be protected. The same result is possible with globes. Further, many charts, technical drawings, diagrams, and even models are created as works of art rather than as useful works. For example, I once saw a show of fanciful designs for an office building in Chicago, in which the models being built were part of an art contest.<sup>27</sup> Each was clearly a work of fine art though ostensibly a "model."

Perhaps the biggest problem area will be "applied art." Again, as with posters, maps, globes, and charts, it must be the artist's *intentions* that count. If the artist intends the work solely as something to be reproduced in utilitarian articles, e.g., on towels, bedspreads, or other commercial items, then perhaps the work is "applied art."<sup>28</sup> If the work is intended to be a work of fine art or to serve some "fine art" purpose, however, a later or simultaneous commercial use should not preclude protection. Congress could have qualified these exclusions in connection with the artist's intentions and the ultimate use of the work, rather than setting forth hard categories.

(A)(ii) [A WORK OF VISUAL ART ALSO DOES NOT INCLUDE] ANY MERCHANDISING ITEM OR ADVERTISING, PROMOTIONAL, DESCRIPTIVE, COVERING, OR PACKAGING MATERIAL OR CONTAINER.<sup>29</sup>

Assuming we can define a "merchandising item" and "advertising or promotional material or container," there will probably still be problems with "descriptive" and "covering" materials or containers. Any artwork with literary text may possibly constitute descriptive mate-

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*Trademarks of the Comm. on the Judiciary, United States Senate*, 101st Cong., 1st Sess. 32 (1989) [hereinafter *Senate Hearings*].

25. See *What is an Original Print?*, *supra* note 11.

26. The work is in the form of a limited edition of 185 and is entitled *Initiation Gauloise* (1976), according to the Thomas Babeor Gallery in La Jolla, California. See JOSEPH BEUYS *MULTIPLES* 153 (J. Schellmann ed., 6th ed. 1985).

27. The traveling exhibition, probably emanating from Chicago, was called "Late Entries to the Chicago Tribune Tower Competition." It was on display at the La Jolla Museum of Contemporary Art, La Jolla, California, from September 13 through October 12, 1980.

28. See opinion of Lord Kilbrandon in *George Hensher Ltd. v. Restawile Upholstery (Lancs) Ltd.*, 1976 App. Cas. 64 (appeal taken from Eng.) (discussion of works of artistic craftsmanship).

29. 17 U.S.C. § 101.

rial. A number of works of fine art are designed to cover other items, including fine art screens used to hide objects behind them.

(A)(iii) [A WORK OF VISUAL ART ALSO DOES NOT INCLUDE] ANY PORTION OR PART OF ANY ITEM DESCRIBED IN CLAUSE (i) OR (ii).<sup>30</sup>

If we cannot be certain about the definitions of the excluded works themselves, further exclusion of their "parts" only makes matters worse.

(B) [A WORK OF VISUAL ART ALSO DOES NOT INCLUDE] ANY WORK MADE FOR HIRE.<sup>31</sup>

Here is a real problem. Artists already have great difficulty determining the meaning of "work made for hire," as shown by the extensive litigation in this area. What about a work only partially created for hire? For example, using the facts and arguments presented to the U.S. Supreme Court in *Community for Creative Non-Violence v. Reid*,<sup>32</sup> what if the corporate employer's share of a joint work is "made for hire," while the independent artist's contribution is not? Could only the independent artist claim moral rights, or could the corporation claim that because the artist's work was *not* made for hire, it, too, would have moral rights? Or would both claims be unsuccessful because part of the work was created for hire?

The only logical answer seems to be an all-or-nothing solution. It would be anomalous, unfair, and misleading to allow the independent artist to claim or disclaim credit for or prevent destruction of a work of art, while co-artists working for the corporate employer and the corporate employer itself would not have the same rights. Either everyone should have the rights, or no one should.

(C) [A WORK OF VISUAL ART ALSO DOES NOT INCLUDE] ANY WORK NOT SUBJECT TO COPYRIGHT PROTECTION UNDER THIS TITLE.<sup>33</sup>

This provision, regardless of expressed intentions, does not exclude from moral rights protection only works not potentially copyrightable, *i.e.*, works of authorship not covered by § 102(a) of the Copyright Act. After all, paintings, drawings, prints, sculptures, and photographs are, by definition, copyrightable subject matter.

Naturally, there are some works "not subject to copyright protection" that do not necessarily deserve moral rights protection. These in-

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30. *Id.*

31. *Id.*

32. 490 U.S. 730 (1989). In *Reid*, the Court held a commissioned sculpture created by an independent contractor was not a "work for hire" within the meaning of § 101 of the Copyright Act. However, the Court remanded the case to the District Court to determine whether the organization that commissioned the work was a joint author of the sculpture and, thus, a co-owner of the copyright under § 201(a). *Id.* at 753.

33. 17 U.S.C. § 101.



clude works of insufficient originality,<sup>34</sup> those created by nationals of countries which have no copyright relations with the United States,<sup>35</sup> those not fixed in a tangible medium of expression,<sup>36</sup> and those otherwise failing to meet the basic requirements for protection under sections 102 and 104 of the Copyright Act.

This exclusion will primarily encompass works placed in the public domain because of the failure to use proper copyright notices before the effective date of the Berne Convention Implementation Act of 1988<sup>37</sup> or the expiration of the copyright term. Additionally, the exclusion covers works that are subject to defenses to an infringement claim, such as estoppel and abandonment.<sup>38</sup>

In litigation under VARA, defendants may argue that copyright notices were not used before March 1, 1989. This is an unwelcome defense, since the issue is not whether there is copyright protection but whether there is moral rights protection. The artist should not forfeit the right to claim or disclaim credit based on his or her failure to use a copyright notice before March 1, 1989.

## II Rights

§ 106A RIGHTS OF CERTAIN AUTHORS TO ATTRIBUTION AND INTEGRITY (a) RIGHTS OF ATTRIBUTION AND INTEGRITY— SUBJECT TO SECTION 107 AND INDEPENDENT OF THE EXCLUSIVE RIGHTS PROVIDED IN SECTION 106, THE AUTHOR OF A WORK OF VISUAL ART—  
(1) SHALL HAVE THE RIGHT—

(A) TO CLAIM AUTHORSHIP OF THAT WORK.<sup>39</sup>

The fair use defense under § 107 of the Copyright Act should have a very limited role in the area of moral rights.<sup>40</sup> A use may infringe upon an artist's moral rights even though it falls into a fair use exception. In part, this is because § 107, which codifies the fair use doctrine, sets forth considerations often having little to do with moral rights. The use or misuse of a work for purposes such as news reporting, scholarship, criticism, review, or classroom teaching—the principal statutory considera-

34. 17 U.S.C. § 102(a) (1988).

35. *Id.* § 104 (Supp. 1991).

36. *Id.* § 102(a).

37. Pub. L. No. 100-568, 102 Stat. 2853 (1988). The effective date was March 1, 1989. See *Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n*, 320 F. Supp. 1303, 1313 (N.D. Ill. 1970) (good example of how an artist (Picasso) and his assignee lost copyright through publication of work without a copyright notice).

38. See 2 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.21[B][2][a] (1991).

39. 17 U.S.C. § 106A(a)(1)(A).

40. *Senate Hearings*, *supra* note 24, at 105-06 (statement of Peter H. Karlen).

tions—should not necessarily nullify a moral rights violation. Whether the conduct is carried out by a nonprofit educational organization is often not relevant, nor is the amount and substantiality of the work used or misused necessarily critical. Perhaps the third and fourth factors listed as § 107 are relevant, namely, the nature of the work and the effect on the market for or value of the work. Nonetheless, it is difficult to imagine, except with landscape works protected as “sculptures,” what a fair use could be, especially based on the fair use arguments one typically encounters in moral rights litigation.

“Fair use,” as argued in moral rights cases, usually has little in common with “fair use” in copyright cases. For instance, when a landscape or environmental work is involved, defendants often argue that the work’s removal is a “fair use” of their land. Sometimes defendants argue that what they perceive as a flaw or error in artwork justifies a modification to “improve” it. Perhaps the closest kind of “fair use” case is where a defendant has made repairs on a damaged or deteriorating work.<sup>41</sup>

Moreover, the rights of attribution and integrity are not totally “independent of the exclusive rights provided in § 106,” at least at one juncture. As Professors Melville Nimmer and David Nimmer point out in their treatise on copyright law,<sup>42</sup> arguably the right to prevent “alteration” regulated by state moral rights statutes is equivalent to the exclusive right to prepare “derivative works” under § 106(2) of the Copyright Act. Consequently, there could be an overlap between the “modification” moral right and the “adaptation” right under copyright law, because the “alteration” right under state statutes is probably equivalent to the right to prevent “modification” under VARA. For example, if a second party owned both the physical art object and its copyright, she could argue that her § 106(2) right to prepare a derivative work based on the original work gives her the right to modify that original in direct conflict with the artist’s moral right to prevent modification.

As far as “claim authorship” is concerned, I still await the argument that the artist can only “claim” credit but is not entitled to actually receive it.<sup>43</sup> A literal reading of the statute would enable the artist only to publicize herself as the author, not necessarily to receive credit on the piece itself. The right to claim credit without the right to receive it does not amount to anything. Naturally, the drafters were counting on the notion that this kind of language, which originated from the Berne Con-

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41. See 17 U.S.C. § 106A(c).

42. NIMMER, *supra* note 38, § 8.21[B][3] (discussing the California statute, but also applicable to its progeny in other states).

43. See Peter H. Karlen, *Moral Rights in California*, 19 SAN DIEGO L. REV. 675, 688-89 (1982).

vention,<sup>44</sup> would have the same meaning attached to it under Continental jurisprudence. They also assumed that the judges and lawyers first viewing this statute would have the same familiarity with moral rights as the readers of this article.

[THE AUTHOR OF A WORK OF VISUAL ART SHALL HAVE THE RIGHT]  
(B) TO PREVENT THE USE OF HIS OR HER NAME AS THE AUTHOR OF  
ANY WORK OF VISUAL ART WHICH HE OR SHE DID NOT CREATE.<sup>45</sup>

A perennial problem is that of the artist whose work suffers minor "improvements" by a dissatisfied purchaser or by another artist hired by the purchaser to make minor changes. Under the statute, arguably the original artist must have little or no role in the creation in order to disclaim credit.<sup>46</sup> The courts will likely construe the statute to allow disclaimer whenever the artist is neither: (1) a joint author who intended to contribute to the work along with other joint authors, nor (2) an individual who created the *entire* work. But why leave this question to the courts?

Another possible argument is that the word "prevent" implies an equitable remedy, not one of damages. As with the term "claim," the term "prevent" has limited application. While the word "claim" in the previous subsection should be accompanied by a way to "receive" credit, "prevent" in this subsection should perhaps be broadened to cover money damages.

[T]HE AUTHOR OF A WORK OF VISUAL ART—  
(2) SHALL HAVE THE RIGHT TO PREVENT THE USE OF HIS OR HER  
NAME AS THE AUTHOR OF THE WORK OF VISUAL ART IN THE EVENT  
OF A DISTORTION, MUTILATION, OR OTHER MODIFICATION OF THE  
WORK WHICH WOULD BE PREJUDICIAL TO HIS OR HER HONOR OR  
REPUTATION.<sup>47</sup>

Again the word "prevent" connotes only an equitable remedy, a meaning supported by the word "would" in connection with "prejudice to honor or reputation." If an actual remedy were allowed after the modification had been made, then the conduct "would" no longer be prejudicial to honor or reputation but would *actually* be prejudicial. A question also arises in relation to the burden of proof on the artist regarding what definitely "would" be prejudicial as opposed to what "could" be prejudicial. There is no injunctive relief for "could," only "would"—and no damages are clearly to be awarded in *either* case. It is sometimes

44. The Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 6bis, reprinted in RICKETSON, *supra* note 3.

45. 17 U.S.C. § 106A(a)(1)(B).

46. Cf. *Follett v. Arbor House Publishing. Co.*, 497 F. Supp. 304, 312 (S.D.N.Y. 1980) (author Ken Follett making lesser-than-advertised, though not negligible, contribution allowed to diminish his credit).

47. 17 U.S.C. § 106A(a)(2).

difficult for the artist to prove prejudice to honor or reputation. Suppose, for example, the owner restores, and therefore modifies, a badly deteriorated work so that the artist's honor or reputation does not suffer but instead is enhanced?

The term "mutilation" should be broad enough to include "defacement," which is covered under state statutes.<sup>48</sup> However, state statutes refer to both "defacement" and "mutilation,"<sup>49</sup> indicating a distinction. Many works of art are merely defaced; thus, using the word "defacement" would have been proper. In fact, "defacement" is a more common violation than "distortion."

(3) [S]UBJECT TO THE LIMITATIONS SET FORTH IN SECTION 113(d)

(A) [THE AUTHOR OF A WORK OF VISUAL ART SHALL] HAVE THE RIGHT—TO PREVENT ANY INTENTIONAL DISTORTION, MUTILATION, OR OTHER MODIFICATION OF THAT WORK WHICH WOULD BE PREJUDICIAL TO HIS OR HER HONOR OR REPUTATION, AND ANY INTENTIONAL DISTORTION, MUTILATION, OR MODIFICATION OF THAT WORK IS A VIOLATION OF THAT RIGHT.<sup>50</sup>

Again, the word "prevent" is used to connote an equitable remedy, especially when juxtaposed with language that gives a damages remedy whenever there is an "intentional" violation. This supports the earlier argument about "preventing" the use of the artist's name when the work is not his or when the work has been mutilated. Again, the term "defacement" should have been used, and again one should be aware that there are cases where it would be difficult for the artist to argue prejudice to honor or reputation.

It is anomalous that the artist's right to injunctive relief with regard to distortion, mutilation, or other modification requires proof of "intentional" conduct, whereas the right to prevent destruction, set forth immediately below, requires no *mens rea*. The artist should be entitled to prevent conduct which the actor *knows* is likely to result in mutilation.

The different *mens rea* with respect to destruction and mutilation is even more problematic when the line between "destruction" and "mutilation" is difficult to discern. Is a work destroyed only when blown to smithereens, or is damage beyond repair considered "destroyed?" Quite frankly, the courts cannot easily draw the line between destruction and mutilation, and there should therefore be no difference between the *mens rea* required for them.

(B) [THE AUTHOR OF A WORK OF VISUAL ART SHALL HAVE THE RIGHT] TO PREVENT ANY DESTRUCTION OF A WORK OF RECOGNIZED

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48. See, e.g., CAL. CIV. CODE § 987; N.Y. ARTS & CULT. AFF. LAW § 14.03.

49. *Id.*

50. 17 U.S.C. 106A(3)(A).

STATURE, AND ANY INTENTIONAL OR GROSSLY NEGLIGENT DESTRUCTION OF THAT WORK IS A VIOLATION OF THAT RIGHT.<sup>51</sup>

The "recognized stature" standard is much more stringent than the "recognized quality" requirement under some state statutes.<sup>52</sup> "Recognized stature" implies that the work has already received acclaim and has been highly regarded by the art world or by the public, regardless of quality.<sup>53</sup> In terms of aesthetic theory, a work has three principal values: artistic, art-historical, and aesthetic.<sup>54</sup> The artistic value of a work stems from the artistic achievement of the artist; the art-historical value is derived from the work's position and role in art history; and the work's aesthetic value is based on its aesthetic characteristics. A work of "recognized stature" need not have aesthetic value, and sometimes not even artistic value.

On the other hand, a work of "recognized quality" might not be deemed to have stature but be recognized by authorities as having sufficient quality to merit preservation. Moreover, the "quality" standard makes it extremely difficult for owner-defendants to argue that the work didn't have the requisite quality. After all, they purchased the work only after conducting an arduous selection process. These defendants usually cannot deny "recognized quality" without otherwise impugning their own judgment.<sup>55</sup>

Perhaps the greatest difficulty with the "recognized stature" standard is that a work only achieves "stature" in the art-historical sense after a significant amount of time has passed. However, many works of art are destroyed soon after creation or installation, before they can achieve any "stature." Most moral rights cases we have encountered involved works in existence for two years or fewer; very rarely did they involve works around for decades. For example, with cases involving public works commissioned by municipalities, the move to oust the work,

51. 17 U.S.C. 106A(3)(B).

52. CAL. CIV. CODE § 987; CONN. GEN. STAT. ANN. §§ 42-116s to -116t; LA. REV. STAT. ANN. §§ 51:2151-2156; ME. REV. STAT. ANN. tit. 27, § 303; MASS. GEN. LAWS ANN. ch. 231, § 85S; NEV. REV. STAT. §§ 598.970-978; N.J. STAT. ANN. §§ 2A:24A-1 to -8; N.M. STAT. ANN. §§ 13-4B-2 to -3; N.Y. ARTS & CULT. AFF. LAW §§ 11.01, 14.03; PA. STAT. ANN. tit. 73, §§ 2101-2110; R.I. GEN. LAWS § 5-62-2 to -6; UTAH CODE ANN. § 64-2a-9.

53. See GEORGE DICKIE, *ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS* (1974) (art status defined by institutional acceptance).

54. See Thomas Kulka, *The Artistic and Aesthetic Value of Art*, 21 *BRIT. J. AESTHETICS* 336 (1981).

55. See *Senate Hearings*, *supra* note 24, at 106-08; see generally Peter H. Karlen, *Aesthetic Quality and Art Preservation*, 41 *J. AESTHETICS & ART CRITICISM* 309 (1983).

which arises from a disgruntled citizenry, usually comes within weeks or months of installation.<sup>56</sup>

Finally, it is not clear why this subsection should contain only two kinds of *mens rea*—"intention" and "gross negligence." What about a "knowing" or "reckless" destruction?<sup>57</sup>

### III

#### Scope and Exercise of Rights

(b) SCOPE AND EXERCISE OF RIGHTS. ONLY THE AUTHOR OF A WORK OF VISUAL ART HAS THE RIGHTS CONFERRED BY SUBSECTION (a) IN THAT WORK, WHETHER OR NOT THE AUTHOR IS THE COPYRIGHT OWNER. THE AUTHORS OF A JOINT WORK OF VISUAL ART ARE CO-OWNERS OF THE RIGHTS CONFERRED BY SUBSECTION (a) IN THAT WORK.<sup>58</sup>

The first sentence of this section may have a technical problem. Because protection extends for the life of the author plus 50 years for certain works created before VARA's effective date (June 1, 1991), persons other than the author will have these rights, namely the author's heirs. However, for works created after the effective date, "only the author" will have the rights, since they end at the author's death.

This section has a bigger problem in the second sentence, which specifies that jointly-owned moral rights will be treated the same way as jointly-owned copyrights.<sup>59</sup> This is an unmitigated disaster. Under copyright law, in the absence of a written agreement to the contrary,<sup>60</sup> any person making more than a minimal qualifying contribution to the work will be considered a joint author and, therefore, a joint and equal owner of the copyright.<sup>61</sup> A joint author/owner has the right to grant non-exclusive licenses with respect to the entire work without the consent of other joint authors, subject only to an accounting for the other joint authors'/owners' equal shares of the profits.<sup>62</sup> A joint owner, there-

56. See Peter H. Karlen, *Moral Rights and Real Life Artists*, 15 HASTINGS COMM/ENT L.J. 929 (1993) (detailing cases involving public controversies regarding removals). As the Second Circuit noted in *Serra v. U.S. Gen. Serv. Admin.*, 847 F.2d 1045, 1047 (2d Cir. 1988), "The pigeons had barely begun to roost on 'Tilted Arc' [Serra's work] before the sculpture became the object of intense public criticism."

57. See Karlen, *supra* note 43, at 707-11 (*mens rea* categories for moral rights violations).

58. 17 U.S.C. § 106A(b).

59. See H.R. REP. NO. 514, 101st Cong., 2d Sess. 17 (1990) (House report on VARA).

60. 17 U.S.C. § 204 (1978) (requiring copyright transfers, including transfers of joint copyright ownership interests, to be in writing).

61. See 17 U.S.C. § 101 (definition of "joint work"); § 201(a) (copyright ownership of joint work); § 106A(b) (joint authors as joint moral rights owners); NIMMER, *supra* note 38, §§ 6.03, 6.07, 6.08.

62. NIMMER, *supra* note 38, at §§ 6.06, 6.10, 6.12.

fore, cannot sue another joint owner for copyright infringement.<sup>63</sup> Applying these same rules to moral rights, however, makes little sense.<sup>64</sup>

Allowing one joint author to "license" or waive moral rights on behalf of all joint authors is unfair, since it would allow one joint author to waive all the other joint authors' rights to claim or disclaim credit.<sup>65</sup> Similarly, one joint author could authorize the destruction of the work, and the other joint authors could do nothing.<sup>66</sup> Moreover, in the absence of a written agreement to the contrary, are all joint authors considered equal, as under copyright law?<sup>67</sup> For example, is the very minor contributor equally entitled to claim and disclaim credit as the principal artist? In my mind, he should not be. Should he be entitled to authorize destruction of the work contrary to the wishes of the principal co-authors? Again, no.

Moral rights and copyrights are completely different rights. Thus, there is little reason for the joint authorship rules to be the same. Moreover, the public policy to encourage licensing of copyrighted works by permitting any joint owner to license without the consent of the others is more important than encouraging the licensing of destruction, mutilation, or alteration of works of art.

#### IV Exceptions to the Rights

##### (c) EXCEPTIONS.

(1) THE MODIFICATION OF A WORK OF VISUAL ART WHICH IS A RESULT OF THE PASSAGE OF TIME OR THE INHERENT NATURE OF THE MATERIALS IS NOT A DISTORTION, MUTILATION, OR OTHER MODIFICATION DESCRIBED IN SUBSECTION (a)(3)(A).<sup>68</sup>

This language does not address the question of how to deal with a work that is negligently, knowingly, or intentionally exposed to the elements. This includes not only rain and snow but also works placed in bright light. For instance, Mark Rothko once permitted an installation of large works to be exposed to light so strong that they faded to nothing.<sup>69</sup> Again, there is a fine line between reasonably cared-for works that deteriorate over a long period of time and improperly cared-for works that would not have deteriorated had they received proper care. To

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63. *Id.*

64. See Karlen, *supra* note 17, at 246-48, 251-62.

65. 17 U.S.C. § 106A(e) (allowing one joint owner to waive the rights of all). See also Karlen, *supra* note 17, at 256-58.

66. Karlen, *supra* note 17, at 256-58.

67. Karlen, *supra* note 17, at 252-53.

68. 17 U.S.C. § 106A(c)(1).

69. Cf. 17 U.S.C. § 106A(c)(2) (liability in connection with lighting and placement).

make the statutory language clearer and more effective, the word "solely" could have been inserted before the words "a result."

The same applies to the phrase "inherent nature of the materials." If exposed to certain conditions, some materials will rapidly deteriorate. Anyone knowingly exposing a work to such conditions would seem to be deliberately destroying it.

(2) THE MODIFICATION OF A WORK OF VISUAL ART WHICH IS THE RESULT OF CONSERVATION, OR OF THE PUBLIC PRESENTATION, INCLUDING LIGHTING AND PLACEMENT, OF THE WORK IS NOT A DESTRUCTION, DISTORTION, MUTILATION, OR OTHER MODIFICATION DESCRIBED IN SUBSECTION (a)(3) UNLESS THE MODIFICATION IS CAUSED BY GROSS NEGLIGENCE.<sup>70</sup>

This section fails to clearly address the situation where modification is caused by knowing or reckless conduct. Perhaps it should read: ". . . modification is caused by *at least* gross negligence."<sup>71</sup>

Another drafting error here is that the exception applies only to a "modification" of a work. What about distortion, mutilation, or destruction which results from gross negligence in the process of conservation or public presentation? Shouldn't these also be actionable? Even if not, who can draw the line between "modification" and "distortion" or "mutilation"?

The definition of "public presentation"<sup>72</sup> is also unclear. Does it have to be in a public place, or will a private reception satisfy the requirement? In any case, this was an unusual way of reintroducing liability for gross negligence for modifications, when subsection (a)(3) primarily addresses intentional conduct.

(3) THE RIGHTS DESCRIBED IN PARAGRAPHS (1) AND (2) OF SUBSECTION (a) [THE RIGHTS TO CLAIM AND DISCLAIM CREDIT] SHALL NOT APPLY TO ANY REPRODUCTION, DEPICTION, PORTRAYAL, OR OTHER USE OF A WORK IN, UPON, OR IN ANY CONNECTION WITH ANY ITEM DESCRIBED AT SUBPARAGRAPH (A) [SPECIFICALLY-DEFINED EXCLUDED WORKS] OR (B) [WORKS MADE FOR HIRE] OF THE DEFINITION OF "WORK OF VISUAL ART" AT SECTION 101, AND ANY REPRODUCTION, DEPICTION, PORTRAYAL, OR OTHER USE OF A WORK IS NOT A DESTRUCTION, DISTORTION, MUTILATION, OR OTHER MODIFICATION DESCRIBED IN PARAGRAPH (3) OF SUBSECTION (a).<sup>73</sup>

Perhaps one problem with depriving artists of crediting rights in connection with commercial depictions of their works is that these depic-

70. *Id.*

71. Under the California moral rights statute "gross negligence" is "the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art." CAL. CIV. CODE § 987(c)(2).

72. For consistency, why not use the terminology "public display," which is used in the definition of "publication" at 17 U.S.C. § 101 or in the rights set out at 17 U.S.C. § 106?

73. 17 U.S.C. § 106A(c)(3).



tions are often used to deprive the artist of credit or injure the artist's reputation by crediting her with work she didn't create. For example, it is one thing for owners of an ordinary magazine to be immune from artists' rights to claim or disclaim credit in connection with depictions of their artwork in the magazine, particularly in advertisements. Consider, however, an art magazine review that depicts the artist's work without giving credit, or depicts the work in mutilated form while wrongfully crediting the artist. In that situation, perhaps there should be no immunity.

It is puzzling that, even though a reproduction, depiction or other similar use won't itself be an actionable destruction, distortion, mutilation, or other modification, there isn't a specific exemption for physically mutilating, distorting, destroying, or modifying reproductions or depictions that are not qualifying limited edition multiples under the definition of "work of visual art."<sup>74</sup>

## V

### Duration of Rights

#### (d) DURATION OF RIGHTS.

(1) WITH RESPECT TO WORKS OF VISUAL ART CREATED ON OR AFTER THE EFFECTIVE DATE SET FORTH IN SECTION 610(a) OF THE VISUAL ARTISTS RIGHTS ACT OF 1990,<sup>75</sup> THE RIGHTS CONFERRED BY SUBSECTION (a) SHALL ENDURE FOR A TERM CONSISTING OF THE LIFE OF THE AUTHOR.<sup>76</sup>

It is unclear why the general term of protection is not conterminous with the general copyright term—life plus 50 years.<sup>77</sup> Under the current wording, any violations occurring after the author's death must be handled under state law when preemption under 17 U.S.C. § 301(f) will not apply. Therefore, with physically altered or destroyed works, disputes are likely to arise about whether the conduct took place before or after the artist's death. Though there will be a three-year statute of limitations under § 507 of the Copyright Act, the courts are not likely to strictly impose that limitation on artists or their heirs when the artist or heirs are unaware of when the conduct took place.<sup>78</sup> Many times the artist or

74. 17 U.S.C. § 101. See Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1740 (1984) (discussing moral rights and reproductions). See also *Wojnarowicz v. American Family Ass'n*, 745 F. Supp 130 (S.D.N.Y. 1990) (applying New York statute to altered reproductions).

75. June 1, 1991, according to Pub. L. No. 101-650, § 610, 104 Stat. 5089, 5132 (1990).

76. 17 U.S.C. § 106A(d)(1).

77. *Id.* § 302 (1978).

78. But usually only a "concealment" will prevent the running of the statute in a copyright case. See NIMMER, *supra* note 38, § 12.05.

heirs discover that a work is missing or that it has been destroyed, but cannot establish the date of the wrong.

(2) WITH RESPECT TO WORKS OF VISUAL ART CREATED BEFORE THE EFFECTIVE DATE SET FORTH IN SECTION 610(a) OF THE VISUAL ARTISTS RIGHTS ACT OF 1990, BUT TITLE TO WHICH HAS NOT, AS OF SUCH EFFECTIVE DATE, BEEN TRANSFERRED FROM THE AUTHOR, THE RIGHTS CONFERRED BY SUBSECTION (a) SHALL BE COEXTENSIVE WITH, AND SHALL EXPIRE AT THE SAME TIME AS, THE RIGHTS CONFERRED BY SECTION 106.<sup>79</sup>

Here, the assumption is that readers will construe the transfer of "title" in reference to the physical art object. Technically speaking, however, a work of authorship is intangible, especially in comparison to the physical art object—the "copy" in which it is embodied.<sup>80</sup>

(3) IN THE CASE OF A JOINT WORK PREPARED BY TWO OR MORE AUTHORS, THE RIGHTS CONFERRED BY SUBSECTION (a) SHALL ENDURE FOR A TERM CONSISTING OF THE LIFE OF THE LAST SURVIVING AUTHOR.<sup>81</sup>

This rule is consistent with the rules for duration of copyright<sup>82</sup> and makes sense. As with copyrights, choose infants for your collaborators.

(4) ALL TERMS OF THE RIGHTS CONFERRED BY SUBSECTION (a) RUN TO THE END OF THE CALENDAR YEAR IN WHICH THEY WOULD OTHERWISE EXPIRE.<sup>83</sup>

Again, this is consistent with copyright protection rules.<sup>84</sup>

## VI Transfer and Waiver

(e) TRANSFER AND WAIVER.

(1) THE RIGHTS CONFERRED BY SUBSECTION (a) MAY NOT BE TRANSFERRED, BUT THOSE RIGHTS MAY BE WAIVED IF THE AUTHOR EXPRESSLY AGREES TO SUCH WAIVER IN A WRITTEN INSTRUMENT SIGNED BY THE AUTHOR. SUCH INSTRUMENT SHALL SPECIFICALLY IDENTIFY THE WORK, AND USES OF THAT WORK, TO WHICH THE WAIVER APPLIES, AND THE WAIVER SHALL APPLY ONLY TO THE WORK AND THE USES SO IDENTIFIED. IN THE CASE OF A JOINT WORK PREPARED BY TWO OR MORE AUTHORS, A WAIVER OF RIGHTS UNDER THIS PARAGRAPH MADE BY ONE SUCH AUTHOR WAIVES SUCH RIGHTS FOR ALL SUCH AUTHORS.<sup>85</sup>

79. 17 U.S.C. § 106A(d)(2).

80. See 17 U.S.C. §§ 106A(c)(2), 202; see also Peter H. Karlen, *Worldmaking: Property Rights in Aesthetic Creations*, 45 J. AESTHETICS & ART CRITICISM 183 (1986).

81. 17 U.S.C. § 106A(d)(3).

82. *Id.* § 302(b).

83. *Id.* § 106A(d)(4).

84. *Id.* § 305.

85. *Id.* § 106A(e)(1).

As mentioned above, this rule for waiver by one joint author can be disastrous.<sup>86</sup> A minor contributor can waive crediting rights for the principal contributors.<sup>87</sup> It is one thing for a joint copyright owner to grant a non-exclusive license, which in most cases does not completely destroy the value of the copyrighted work. It is another thing for one co-author to allow complete destruction of a work of art without consent of the others.

(2) OWNERSHIP OF THE RIGHTS CONFERRED BY SUBSECTION (a) WITH RESPECT TO A WORK OF VISUAL ART IS DISTINCT FROM OWNERSHIP OF ANY COPY OF THAT WORK, OR OF A COPYRIGHT OR ANY EXCLUSIVE RIGHT UNDER A COPYRIGHT IN THAT WORK. TRANSFER OF OWNERSHIP OF ANY COPY OF A WORK OF VISUAL ART, OR OF A COPYRIGHT OR ANY EXCLUSIVE RIGHT UNDER A COPYRIGHT, SHALL NOT CONSTITUTE A WAIVER OF THE RIGHTS CONFERRED BY SUBSECTION (a). EXCEPT AS MAY OTHERWISE BE AGREED BY THE AUTHOR IN A WRITTEN INSTRUMENT SIGNED BY THE AUTHOR, A WAIVER OF THE RIGHTS CONFERRED BY SUBSECTION (a) WITH RESPECT TO A WORK OF VISUAL ART SHALL NOT CONSTITUTE A TRANSFER OF OWNERSHIP OF ANY COPY OF THAT WORK, OR OF OWNERSHIP OF A COPYRIGHT OR OF ANY EXCLUSIVE RIGHT UNDER A COPYRIGHT IN THAT WORK.<sup>88</sup>

These provisions are consistent with § 202 of the Copyright Act, which distinguishes copyright ownership from ownership of the physical object in which the work is embodied. Assuming there is no conflict between or overlapping of the "modification" right under § 106A and the "adaptation" right under § 106(2) as discussed above,<sup>89</sup> the tripartite division of ownership, elaborately confirmed, is workable and consistent with the policies behind copyright and moral rights laws.

## VII Works in Buildings

### § 113(a) SCOPE OF EXCLUSIVE RIGHTS IN PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS

#### (1) IN A CASE IN WHICH—

(A) A WORK OF VISUAL ART HAS BEEN INCORPORATED IN OR MADE PART OF A BUILDING IN SUCH A WAY THAT REMOVING THE WORK FROM THE BUILDING WILL CAUSE THE DESTRUCTION, DISTORTION, MUTILATION, OR OTHER MODIFICATION OF THE WORK AS DESCRIBED SECTION 106A(a)(3), AND

(B) THE AUTHOR CONSENTED TO THE INSTALLATION OF THE WORK IN THE BUILDING EITHER BEFORE THE EFFECTIVE DATE SET FORTH IN SECTION 610(a) OF THE VISUAL ARTISTS RIGHTS ACT

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86. *See supra* text accompanying notes 59-67.

87. *See* Karlen, *supra* note 17, at 258.

88. 17 U.S.C. § 106A(e)(2).

89. *See supra* text accompanying note 42.

OF 1990, OR IN A WRITTEN INSTRUMENT EXECUTED ON OR AFTER SUCH EFFECTIVE DATE THAT IS SIGNED BY THE OWNER OF THE BUILDING AND THE AUTHOR AND THAT SPECIFIES THAT INSTALLATION OF THE WORK MAY SUBJECT THE WORK TO DESTRUCTION, DISTORTION, AND MUTILATION, OR OTHER MODIFICATION, BY REASON OF ITS REMOVAL, THEN THE RIGHTS CONFERRED BY PARAGRAPHS (2) AND (3) OF SECTION 106A(a) [RIGHTS OF DISCLAIMER AND OF INTEGRITY] SHALL NOT APPLY.<sup>90</sup>

Because there has been little or no litigation over the meaning of the term "building," this term should have been defined at 17 U.S.C. § 101.<sup>91</sup> Not every edifice is a "building." For example, what about a monument, a concrete support section for an elevated highway, or a landscape work? The essence of most "buildings" is the enclosed space created and sheltered by the construction. Many monuments have enclosed space, and the question is whether the enclosed space is meant for shelter or human habitation.<sup>92</sup>

Perhaps the greatest fault of all the moral rights statutes providing integrity rights, both state and federal, is that they distinguish between removable and non-removable works. As some of the litigation shows, if enough money is spent, almost any work can be "removed."<sup>93</sup> Thus, in almost all cases, there is no distinction between removable and non-removable works. It is also a puzzle why removability is couched only in terms of "harm" to the work rather than to the building.<sup>94</sup>

What is terribly wrong about this section is that works consensually installed before the effective date of the Act (June 1, 1991) could be unprotected. The legislation should have left an exemption for those artists who had actually reserved their moral rights in a written instrument signed by the building owner. One concern is that many such artists installing non-removable works may have relied on integrity rights existing under the various state statutes, requiring written reservation of

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90. 17 U.S.C. § 113(d)(1).

91. After all, the definition of "architectural work" at 17 U.S.C. § 101 also depends on what is a "building," and state moral rights statutes similarly have "works-in-buildings" clauses that do not define the term. See, e.g., CAL. CIV. CODE § 987; CONN. GEN. STAT. ANN. §§ 42-116s to -116t; MASS. GEN. LAWS ANN. ch. 231, § 85S; N.M. STAT. ANN. §§ 13-4B-2 to -3; PA. STAT. ANN. tit. 73, §§ 2101-2110.

92. See H.R. REP. NO. 735, 101st Cong., 2d Sess. 20 (1990) (House report on computer software rentals and the Architectural Works Protection Act of 1990) (definition of "building").

93. See Peter H. Karlen, *Art Destruction: The Michael Schnorr Case*, ARTWEEK, Mar. 28, 1987, at 11; Peter H. Karlen, *Art Destruction: The Michael Schnorr Verdict*, ARTWEEK, Oct. 31, 1987, at 12.

94. See, e.g., CAL. CIV. CODE § 987; LA. REV. STAT. ANN. §§ 51:2151-:2156; MASS. GEN. LAWS ANN. ch. 231, § 85S; PA. STAT. ANN. tit. 73, §§ 2101-2110.

moral rights for such installations.<sup>95</sup> However, now that the federal statute preempts all state laws covering the same rights and subject matter, arguably the state moral rights reserved in writing may no longer apply, and the artist is completely unprotected by statute.<sup>96</sup>

Perhaps in such a case, the artist could argue that the preemption statute only applies to "works of visual art to which the rights conferred by § 106A apply."<sup>97</sup> Because the rights will not apply to earlier works, there would arguably be no preemption and state law protection would remain.

The worst thing about this subsection is that it takes the opposite approach from that of the state statutes. Under the California statute and its progeny,<sup>98</sup> the artist must get a written reservation of rights to protect his or her rights in non-removable works installed in buildings. Under VARA, the building owner must get a written consent to installation. Under the state statutes, if the artist failed to obtain a written reservation or the owner refused to give one, the artist might lose the work upon its removal. Under VARA, however, the forgetful owner could be saddled with a problem of immense proportions if the work must be removed or the building demolished. Moreover, an artist who believes he is protected under federal law because the building owner failed to get a "consent" could have his works destroyed immediately upon his death, when state law again applies.<sup>99</sup>

(2) IF THE OWNER OF A BUILDING WISHES TO REMOVE A WORK OF VISUAL ART WHICH IS PART OF SUCH BUILDING AND WHICH CAN BE REMOVED FROM THE BUILDING WITHOUT THE DESTRUCTION, DISTORTION, MUTILATION, OR OTHER MODIFICATION OF THE WORK AS DESCRIBED IN SECTION 106A(a)(3), THE AUTHOR'S RIGHTS UNDER PARAGRAPHS (2) AND (3) OF SECTION 106A(a) [THE RIGHTS OF DISCLAIMER AND INTEGRITY] SHALL APPLY UNLESS—

(A) THE OWNER HAS MADE A DILIGENT, GOOD FAITH ATTEMPT WITHOUT SUCCESS TO NOTIFY THE AUTHOR OF THE OWNER'S INTENDED ACTION AFFECTING THE WORK OF VISUAL ART.<sup>100</sup>

In this section a "written" notice should have been mentioned in relation to "good faith" efforts. Also, the emphasis on the owner locating the artist to give notice is wrong. Artists should be required to regis-

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95. See, e.g. CAL. CIV. CODE § 987; CONN. GEN. STAT. ANN. §§ 42-116s to -116t; LA. REV. STAT. ANN. §§ 51:2151-:2156; MASS. GEN. LAWS ANN. ch. 231, § 85S; PA. STAT. ANN. tit. 73, § 2101-2110.

96. Of course, those artists might still retain protection via their contract rights under the written instrument.

97. See 17 U.S.C. § 301(f)(1).

98. See CAL. CIV. CODE § 987; MASS. GEN. LAWS ANN. ch. 231, § 85S; PA. STAT. ANN. tit. 73, §§ 2101-2110.

99. 17 U.S.C. §§ 106A(d)(1), 301(f)(2)(C).

100. *Id.* § 113(d)(2)(a).

ter installed works with the Copyright Office rather than have an optional registration, as mentioned below.<sup>101</sup> Every artist could then easily receive a notice, and those who fail to record or update their registration would be out of luck. Another ploy suggested by the California resale royalties law is to allow owners to send notices to the Copyright Office, even for unregistered artists, so that receipt by the Copyright Office will be deemed good notice to the artist.<sup>102</sup>

It is also unclear how this section would apply to joint works. Is notifying only one joint author enough? If so, the building owner could deliberately notify only the joint author willing to go along with removal and loss of moral rights.<sup>103</sup>

(B) IF THE OWNER OF A BUILDING WISHES TO REMOVE A WORK OF VISUAL ART WHICH IS PART OF SUCH BUILDING AND WHICH CAN BE REMOVED FROM THE BUILDING WITHOUT THE DESTRUCTION, DISTORTION, MUTILATION, OR OTHER MODIFICATION OF THE WORK AS DESCRIBED IN SECTION 106A(a)(3), THE AUTHOR'S RIGHTS UNDER PARAGRAPHS (2) AND (3) OF SECTION 106A(a) [THE RIGHTS OF DISCLAIMER AND INTEGRITY] SHALL APPLY UNLESS THE OWNER DID PROVIDE SUCH NOTICE IN WRITING AND THE PERSON SO NOTIFIED FAILED, WITHIN 90 DAYS AFTER RECEIVING SUCH NOTICE, EITHER TO REMOVE THE WORK OR TO PAY FOR ITS REMOVAL.<sup>104</sup>

It is unclear why this section refers to a "person so notified" rather than an "author" so notified. Also, there is again a problem with joint authorship because the "person so notified" may decline to remove the work, whereas other joint authors might have acted differently.<sup>105</sup> Because this part of VARA works just like the integrity rights provided under various state statutes,<sup>106</sup> the critique raised regarding the California statute is applicable here.<sup>107</sup> With removable works, there is no problem giving the building owner wide latitude to remove them. But if the work is easily taken out of the building, why should the building owner subsequently be allowed to destroy it if the artist has not come forward to remove the piece or pay for its removal?<sup>108</sup> After all, the removed piece is now just like any other work not originally installed in a building. Perhaps the only argument is that some attempt to notify the artist was

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101. See *id.* § 113(d)(2)(B), (d)(3).

102. See CAL. CIV. CODE § 986(a).

103. See 17 U.S.C. § 106A(e)(1) (allowing waiver by any joint owner).

104. 17 U.S.C. § 113(d)(2)(B).

105. Cf. Karlen, *supra* note 17, at 267-68 (proposals regarding registration, notification, and jointly-owned rights).

106. See CAL. CIV. CODE § 987; LA. REV. STAT. ANN. §§ 51:2151-2156; MASS. GEN. LAWS ANN. ch 231, § 85S; PA. STAT. ANN. tit. 73, §§ 2101-2110.

107. See Karlen, *supra* note 43, at 718-21.

108. *Id.*

made, or notice was actually given, and the building owner had to incur the expense of removal.

FOR PURPOSES OF SUBPARAGRAPH (A), AN OWNER SHALL BE PRESUMED TO HAVE MADE A DILIGENT, GOOD FAITH ATTEMPT TO SEND NOTICE IF THE OWNER SENT SUCH NOTICE BY REGISTERED MAIL TO THE AUTHOR AT THE MOST RECENT ADDRESS OF THE AUTHOR THAT WAS RECORDED BY THE REGISTER OF COPYRIGHTS PURSUANT TO PARAGRAPH (3). IF THE WORK IS REMOVED AT THE EXPENSE OF THE AUTHOR, TITLE TO THAT COPY OF THE WORK SHALL BE DEEMED TO BE IN THE AUTHOR.<sup>109</sup>

Again, this system doesn't make much sense. The artist should have a mandatory recording. Additionally, if title to the installed copy of the work is "deemed to be in the author" who removed the work, what happens with joint works? Does the co-author who undertakes the expense of removal thereby acquire complete ownership?<sup>110</sup> Also, what happens to security interests and liens imposed on the physical art object by the building owner? Does the author not only get full title vis-à-vis the building owner, but also in relation to all other persons who may have acquired interests in the physical art object?<sup>111</sup>

(3) THE REGISTER OF COPYRIGHTS SHALL ESTABLISH A SYSTEM OF RECORDS WHEREBY ANY AUTHOR OF A WORK OF VISUAL ART THAT HAS BEEN INCORPORATED IN OR MADE PART OF A BUILDING, MAY RECORD HIS IDENTITY AND ADDRESS WITH THE COPYRIGHT OFFICE. THE REGISTER SHALL ALSO ESTABLISH PROCEDURES UNDER WHICH ANY SUCH AUTHOR MAY UPDATE THE INFORMATION SO RECORDED, AND PROCEDURES UNDER WHICH OWNERS OF BUILDINGS MAY RECORD WITH THE COPYRIGHT OFFICE EVIDENCE OF THEIR EFFORTS TO COMPLY WITH THIS SUBSECTION.<sup>112</sup>

The Copyright Office has issued regulations which prescribe the content of the recorded documents.<sup>113</sup> However, no forms have yet been developed for these recordings, so the artist or building owner must ensure that the document submitted contains all the prescribed information. So far only one artist has recorded under this statute,<sup>114</sup> another reason for the contention that artists should be required to record or

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109. 17 U.S.C. § 113 (d)(2).

110. It would seem so. After all, ownership of the physical art object is distinct from copyright and moral rights ownership according to 17 U.S.C. §§ 106A(e)(1) and 202, so that status as joint moral rights owner and copyright owner would not affect the ability to acquire full title to the art object by purchase.

111. See, e.g., U.C.C. §§ 9-201 to -318 (1985 & Supp. 1992) (acquisition and perfection of security interests and rights of third parties).

112. 17 U.S.C. § 113(d)(3).

113. 37 C.F.R. § 201.25 (1992) ("Visual Arts Registry").

114. See Peter H. Karlen, *Art Destruction: The John Spears Case*, ART CALENDAR, Feb. 1993, at 11.

otherwise lose their rights to receive notices of removal directly sent to their addresses.

## VIII Preemption

### § 301 PREEMPTION WITH RESPECT TO OTHER LAWS

(F)(1) ON OR AFTER THE EFFECTIVE DATE SET FORTH IN SECTION 610(a) OF THE VISUAL ARTISTS RIGHTS ACT OF 1990 [JUNE 1, 1991], ALL LEGAL OR EQUITABLE RIGHTS THAT ARE EQUIVALENT TO ANY OF THE RIGHTS CONFERRED BY SECTION 106A WITH RESPECT TO WORKS OF VISUAL ART TO WHICH THE RIGHTS CONFERRED BY SECTION 106A APPLY ARE GOVERNED EXCLUSIVELY BY SECTION 106A AND SECTION 113(d) AND THE PROVISIONS OF THIS TITLE RELATING TO SUCH SECTIONS. THEREAFTER, NO PERSON IS ENTITLED TO ANY SUCH RIGHT OR EQUIVALENT RIGHT IN ANY WORK OF VISUAL ART UNDER THE COMMON LAW OR STATUTES OF ANY STATE.<sup>115</sup>

This is the same kind of preemption language used for copyrights under 17 U.S.C. § 301. This preemption statute will ultimately give rise to litigation simply because of the problems associated with defining protected subject matter (the “work of visual art”<sup>116</sup>) and the rights conferred by § 106A. A question that arises is whether the “alteration” and “defacement” rights under the state statutes will be equivalent to the “modification” and “mutilation” rights under the federal statute. For example, the New York and California statutes and their progeny refer both to “mutilation” and “defacement,” which signifies that such terms have different meanings and therefore are not equivalent.<sup>117</sup>

Also, because the federal statute only allows disclaimer for mutilated works if mutilation has been prejudicial to the artist’s honor or reputation, is this equivalent to the much broader right under state law to disclaim for any “just and valid reason”?<sup>118</sup> Arguably, where there has been no prejudice to honor or reputation but the artist has a just and valid cause for disclaimer, the artist should be allowed to proceed under state law.

(2) NOTHING IN PARAGRAPH (1) ANNULS OR LIMITS ANY RIGHTS OR REMEDIES UNDER THE COMMON LAW OR STATUTES OF ANY STATE WITH RESPECT TO—

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115. 17 U.S.C. § 301(f)(1).

116. Definition at 17 U.S.C. § 101.

117. See, e.g., CAL. CIV. CODE § 987; CONN. STAT. ANN. §§ 42-116s to -116t; LA. REV. STAT. ANN. §§ 51:2151-2156; ME. REV. STAT. ANN. tit 27, § 303; N.J. STAT. ANN. §§ 2A:24A-1 to -8; N.Y. ARTS & CULT. AFF. LAW §§ 11.01, 14.03; PA. STAT. ANN. tit. 73, §§ 2101-2110.

118. See *id.*



(A) ANY CAUSE OF ACTION FROM UNDERTAKINGS COMMENCED BEFORE THE EFFECTIVE DATE SET FORTH IN SECTION 610(a) OF THE VISUAL ARTISTS RIGHT ACT OF 1990;

(B) ACTIVITIES VIOLATING LEGAL OR EQUITABLE RIGHTS THAT ARE NOT EQUIVALENT TO ANY OF THE RIGHTS CONFERRED BY SECTION 106A WITH RESPECT TO SUCH WORKS OF VISUAL ART; OR

(C) ACTIVITIES VIOLATING LEGAL OR EQUITABLE RIGHTS WHICH EXTEND BEYOND THE LIFE OF THE AUTHOR.<sup>119</sup>

As mentioned above, determining whether the legal or equitable rights are equivalent may be a very difficult task; moreover, it is not clear why protection did not extend for the full copyright term.

## IX Conclusion

Despite its problems, VARA can still weather any storm of litigation. It is too bad, however, that the drafters left so much to be decided by the courts. Unfortunately Congress, though considering moral rights legislation for years, had scarcely any precedents on which to rely. After all, state laws had generated few appellate decisions by the time VARA was given life.<sup>120</sup> Thus, only practice under VARA will prime new amendments.

Mistakes and all, VARA is still arguably the most important legislation for artists ever enacted in the United States, and its sponsors deserve credit just for getting it passed over the objections and criticisms of user groups.

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119. 17 U.S.C. § 301(f)(2).

120. California, which has the oldest statute and probably has had the most moral rights litigation, only has had two appellate cases, neither of much consequence. In *Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc.*, 159 Cal. App. 3d at 644 (1984), the court peripherally noted that architectural plans are not "drawings" under the California Art Preservation Act. In *Botello v. Shell Oil Co.*, 229 Cal. App. 3d 1130 (1991), the court said the obvious, a mural is a "painting" under the statute.